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June 12, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Acceleration of Broadband Deployment By Improving Policies
Regarding Public Rights of Way and Wireless Facilities Siting,***
WC Docket No. 11-59

Dear Ms. Dortch:

The City of Lafayette, California submits these comments and video to make a number of simple points, not the least of which is that modifications to existing wireless facilities – particularly facilities in the rights of way - can raise significant issues, and the industry cannot be relied upon to address those issues itself. Industry efforts to convince the FCC that modifications of existing wireless facilities present little risk and should be subject to no or limited review merely illustrate that point.¹ While the FCC can serve an important role as a clearinghouse for information, it should avoid seeking to regulate what is necessarily a local review process that must be based upon the facts specific to particular installations. It would be dangerous to the public, and harmful to communities, to attempt to develop federal rules that prevented localities from fully considering the impact of installations, or modifications to installations in the right-of-way.

I. Video Representation of Risks

Lafayette has supported – and approved – the installation of many types of wireless facilities. The City files this letter and video to clarify for the Commission just how important it is for the Commission to recognize that the placement and modification of these facilities, particularly facilities located on or adjacent to the rights-of-way, present risks to the public, and also (because of the size, and shape of the facilities) present issues that are very different than the issues generally created by traditional wireline installations.

The risks and issues are illustrated by the video that is being filed with this ex parte. The video shows the result of a modification of an existing AT&T wireless antenna and associated facilities which had been placed on and adjacent to a utility pole in the rights-of-way. The modification was made without obtaining all the necessary approvals required by the City, and the result was a new structure that significantly altered the appearance of the neighborhood, and which

¹ The City of Lafayette, California submits these comments in response to ex partes filed by PCIA—The Wireless Infrastructure Association and The DAS Forum, a membership section of PCIA on February 6, 2012.



the video states created safety hazards. All of the ground-mounted equipment has been removed, including all of the non-permitted installations.

II. Structure Inconsistent with City's Planning and Mission

Lafayette is a residential community of approximately 25,000 in Northern California, located between Walnut Creek and Oakland. It is known for its pastoral, rolling hills. The City's plans are intended to ensure that the City is bicycle and pedestrian-friendly, and that the City's streets and sidewalks are safe for children. Plans for placement of wireless facilities in the rights-of-way are subject to review by two divisions. The Engineering Services Division has primary responsibility for ensuring that the *installation process* (including associated street blockage, trenching and so on) is conducted in accordance with applicable law. In addition, proposed placements must be reviewed by the Planning Services Division, which has primary responsibility for ensuring that the installation that is to be built will be consistent with other uses of the area where the facility is to be placed, and not interfere with other uses, or otherwise adversely affect the neighborhood within which the facility is to be located. Approvals are required from *both* departments before an installation can proceed. While the process is streamlined, both reviews are necessary to protect the public: different expertise is involved, and different concerns arise in connection with each division's review of applications for placement or modification of facilities.

In May 2005, the City conditionally approved a land use permit (#L04-05) for AT&T to install two wireless antennas and two equipment cabinets on certain utility poles in the City. As approved, the company was required to return to the City should it alter the installation in any meaningful respect. In February 2008, the City approved the replacement of same size, shape and color, the installation of an additional pole-mounted equipment cabinet, and a ground-mounted equipment cabinet on a new H-frame. In May 2010, AT&T approached the City's Engineering Services Division, and obtained approval for a plan to modify the facilities by substantially expanding the ground-mounted equipment. But, AT&T failed to follow the second step in the process and obtain land use permit approval by the Planning Services Division. Instead, it proceeded to replace existing equipment, including the approved H-frame, with new, larger and more intrusive equipment. Local residents began to complain about the installation, and in 2011, the City issued a warning to AT&T that it had failed to comply with applicable City codes. The response by AT&T – in the face of complaints by residents that the facilities presented a hazard – was that it would take a minimum of nine months to retrofit the facilities to a size consistent with the original approvals, because that equipment was no longer being manufactured. In the face of City demands and shortly after newspapers articles began to appear in late 2011 and early 2012 highlighting the problem, AT&T elected to remove the non-permitted facilities.

III. Lessons Learned

Lafayette believes that there are several lessons to be learned from this incident and that the lessons are not limited to Lafayette:

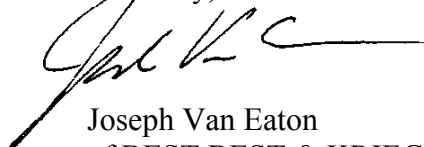
1. Industry cannot be relied upon to police itself in designing and placing facilities used in connection with wireless communications.

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2. Modifications to DAS facilities and other wireless facilities in the right-of-way can and do present issues that are different than the issues normally faced by communities with respect to use of the rights-of-way by wireline facilities. The latter tend to be more stable, predictable installations by regulated utilities or quasi-utilities.
3. Installations and modifications of facilities in the rights-of-way can result in significant harms even if, in absolute terms, the increase in the size of an installation is small. This increased risk of harm to the public arises as a result of the proximity of the facilities to vehicular and pedestrian traffic. There is also a more direct impact on the appearance of the neighborhood and on sight lines important to vehicular and pedestrian traffic safety.
4. Allowing modifications to right-of-way facilities without appropriate review could have significant impacts on the public and on communities.
5. Impacts are likely to be community-specific, and depend on the location of the facility. In the instant matter, the modifications made by AT&T might have been entirely acceptable in an industrial community, or on a roadway that was not pedestrian accessible. It was inappropriate in the situation illustrated by the video. Local discretion embodied in local codes and regulations is necessary to avoid harms.

Lafayette is not opposed to wireless facilities in the rights-of-way. In part in response to this incident, it is reviewing its own ordinances and processes to ensure that wireless access and facility issues are addressed in a manner that properly balances industry and public interests. The FCC can serve an important role as a clearinghouse for information, but in light of the harms that can be created, it should avoid seeking to regulate what is necessarily a local process that must address problems based on specific facts.

Sincerely,



Joseph Van Eaton
of BEST BEST & KRIEGER LLP

Counsel for the City of Lafayette, California